SC87495

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel.
Riverside Pipeline Company, L.P., and
Mid-Kansas Partnership,

Respondents,

v.

Public Service Commission
of the State of Missouri,

Appellant.

Appeal from the Circuit Court of Cole County, Missouri
Case No. 02CV324478
The Honorable Thomas J. Brown III

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ARGUMENT

I. The Court of Appeals Erred in Dismissing the PSC's Appeal Because Rule 84.05(e) Does Not Impose An "Aggrieved" Party Standing Requirement In That §§ 386.500.1 and 386.510 Permit Any "Interested" Person to Pursue Review of an Order of the Public Service Commission

Because the court of appeals issued an opinion that directly contradicts this Court's earlier decision, the PSC views this appeal as an opportunity to ask this Court to reconsider its opinion in *State ex rel. Riverside Pipeline Co. v. Public Serv. Comm'n*, 165 S.W.3d 152 (Mo. banc 2005) (*Riverside III*). The PSC, now arguing in support of the court of appeals opinion even though the PSC never raised this issue below, seeks to read an "aggrieved" person standard into § 386.510 and Rule 84.05(e). Because no such standard exists, there is no reason for this Court to "reconsider" its prior opinion holding that "[w]hether Riverside and MKP were 'aggrieved' by the decision of the PSC *is of no consequence*." *Id.* at 155 (emphasis added).

A. The PSC Is Not a Court of Law

The PSC is a politically-appointed executive agency. It is not a court of law endowed by the Missouri Constitution with the power to be the final arbiter of disputes. Because this executive agency acts in a quasi-judicial capacity, the legislature authorized all "interested persons" to intervene and participate in the PSC's decision-making process, § 386.500.1, and to then seek judicial review of the PSC's decisions under the Public Service Commission Act. § 386.510.

The PSC's argument that interpreting the interested person standard set forth in §§ 386.500.1 and 386.510 would "abandon" traditional notions of standing has no legal support. The quasi-judicial actions of the PSC are legislatively-created and the legislature was free to set the rules and standards by which the PSC could conduct quasi-judicial activities. *State ex rel. Consumers Pub. Serv. Co. v. Public Serv. Comm'n*, 180 S.W.2d 40, 45-46 (Mo. banc 1944); *see also Jarvis v. Director of Revenue*, 804 S.W.2d 22, 25 (Mo. banc 1991) (while judicial review is constitutionally mandated, the manner in which the review is conducted may be determined by the legislature). The legislature was thus free to broaden the scope of potential parties to a quasi-judicial proceeding. And, because the PSC's rulings often impact others beyond the regulated entity, it was necessary to broaden standing requirements to allow unregulated persons or entities, like Riverside/MKP here, to participate in PSC proceedings.

The PSC relies on *American Petroleum Exchange v. Public Service Commission*, 176 S.W.2d 533 (Mo. App. 1943) in claiming that a party must be aggrieved by a decision of the PSC to seek review in the circuit court. This Court overruled that portion of *American Petroleum*, however, finding that it was "based upon too narrow a view of the Public Service Commission Act." *State ex rel. Consumers*, 180 S.W.2d at 44. As this Court held in both *State ex rel. Consumers* and *Riverside III*, the "aggrieved" standard applies only to appeals from the circuit court to the court of appeals.

The PSC cites, but essentially ignores, this Court's holding in *State ex rel. Consumers*. The PSC argues that the "interested person" standard found in § 386.500.1 applies only to a party seeking to intervene in or seek rehearing of a PSC order and that the aggrieved party standard still applies to both the filing of an appeal under § 386.540 and to the filing of a petition for review under § 386.510. This Court's holding in *State ex rel. Consumers* actually states that the "interested" person standard of § 386.500.1 governs "the right to be a party to review proceedings *both* in the circuit *and appellate courts.*" *Id.* at 46 (emphasis added).

Under the Public Service Commission Act, the "interested person" standard necessarily applies to every stage of the process. Section 386.500 provides that any interested person has the right to apply for rehearing of an order or decision of the Commission. Section 386.510 then states that any "applicant" whose application for rehearing is denied may file a petition for writ of review. It also states that "each party to the action or proceeding before the commission shall have the right to appear in the review proceedings."

Here, Riverside/MKP was a party before the PSC, lost its challenge to the PSC's jurisdiction to proceed, was an "applicant" for rehearing on the issue of jurisdiction under § 386.500, lost that motion, and then filed a petition for review under § 386.510. There is no statutory or other basis to deny Riverside/MKP standing to have sought a writ of review under § 386.510. *State ex rel. Consumers*, 180 S.W.2d at 46 ("There is nothing in any other section to indicate that such an 'interested' party

shall not have the right (if his application for rehearing is denied) to exhaust all further remedies provided both to obtain review in the circuit court and to appeal from a circuit court decision against him."). In *State ex rel. Consumers*, this Court concluded that because the intervenor company had standing to intervene and apply for rehearing, it had "the further right … to seek a review in the circuit court and appeal to this court from its adverse decision." *Id.*

In *State ex rel. Consumers* the Court found that the term "interested" in § 386.500 is "a broader term than 'aggrieved.'" *Id.* at 43. "Considering the Public Service Commission Act as a whole, it seems apparent that parties to cases before the Commission, whether as complainants or intervenors are not required to have a pecuniary interest, or property or other rights, which will be directly or immediately affected by the order sought or even its enforcement." *Id.* at 46. In fact, the aggrieved person standard would effectively foreclose the opportunity of any intervenor to seek review of a PSC order because this Court has held that a private person cannot be "aggrieved" by a PSC order. *Id.* at 44. Because the aggrieved person standard cannot apply, the interested person standard must govern.

While unnecessary to find that Riverside/MKP had standing to seek review in the circuit court, the interested person standard effectively merges with the aggrieved party standard in § 512.020 in appeals taken under § 386.540. "When an order against such an interested party is affirmed in the Circuit Court it would seem that he is 'aggrieved.'" *Id.* at 44; *see also State ex rel. St. Louis Cty. v. Public Serv. Comm'n*,

228 S.W.2d 1, 3 (Mo. 1950) (interpreting *State ex rel. Consumers* to hold "that where an order was against 'an 'interested' party' to a Public Service Commission proceeding, such interested party was a party 'aggrieved' within the meaning of [§ 512.020]"); *accord State ex rel. McKittrick v. Missouri Pub. Serv. Comm'n*, 175 S.W.2d 857, 860 (Mo. banc 1943) (declaring in dicta that "at least [as to] appeals," standing requires that a person be interested and aggrieved).

B. The PSC Was Aggrieved by the Circuit Court's Order and It Thus Had Standing To Appeal

As in the prior appeal, the PSC seems to have again lost sight of the fact that it filed the appeal here, not Riverside/MKP. As this Court previously found, the PSC was "aggrieved" by the judgment of the circuit court and thus had standing to appeal to the court of appeals. *Riverside III*, 165 S.W.3d at 155.

Despite the court of appeals opinion below, not even the PSC argues that Rule 84.05(e) imposes an "aggrieved person" standard on petitions for review under § 386.510. Rule 84.05(e) relates only to appeals to the appellate courts, not to petitions filed in circuit court. *See State ex rel. Southwestern Bell Tel. v. Brown*, 795 S.W.2d 385, 388 (Mo. banc 1990) (finding Rule 84.09 did not apply to a petition for writ of review). Further, this Court has already decided that a petition for writ of review under § 386.510 is an original proceeding in equity and not an appeal. *See id.* at 388. There is thus no basis to argue that Rule 84.05(e) somehow governs the standard for filing a proceeding in equity in circuit court. As this Court previously

held in *Riverside III*, Rule 84.05 has no bearing on Riverside/MKP's right of review in the circuit court. 165 S.W.3d at 155.

C. Even If the Aggrieved Party Standard Applied, The Petition for Review Was Proper

Even if the "aggrieved" party standard applied here, the PSC's argument that Riverside and MKP were not harmed by the PSC order nullifying the settlement provision resolving the prudence of the decisions associated with the execution of the Missouri Agreements simply because it did not disallow any of MGE's gas costs in that particular ACA proceeding misses the point. As the PSC acknowledges, Riverside/MKP are in this litigation due to their underlying agreements with MGE, which pre-date the settlement agreement. As the PSC also recognizes, due to the PSC's stated inability to interpret and apply the Stipulation, Riverside/MKP will be forced to re-litigate these same issues in numerous subsequent ACA cases.

This is not elective litigation as the PSC argues and the harm MKP/Riverside is suffering is not self-imposed. As Commissioner Murray found in her dissent below, the PSC has placed Riverside/MKP in an untenable position. (App. A-52). MKP/Riverside paid roughly $3 million to settle potential liability and the PSC nullified that benefit of the settlement bargain. Riverside/MKP have been harmed by the PSC's ruling (or lack thereof) and must be permitted to challenge this jurisdictional decision by the PSC.

II. The PSC Erred in Reaching the Merits of the Staff's Proposed Disallowance Review Because Further Prudence Review of the Decisions Associated With the Execution of the Missouri Agreements Was Precluded In That The Stipulation Settled and Compromised the Prudence of the Missouri Agreements

A. Construction of an Ambiguous Contract Is A Question of Law

In its Report and Order, the PSC held that the interpretation of the Stipulation was a question of law, not of fact, but nonetheless held that it could not resolve the ambiguity after receiving parol evidence. In multiple briefs throughout the many appeals in this case, the PSC continued to acknowledge that the issue was one of law, not fact, but argued for a different interpretation than that found by the circuit court. Perhaps realizing the inconsistency of holding that the Stipulation was "too ambiguous" to interpret yet nevertheless espousing a specific interpretation, the PSC now claims, contrary to its own Report and Order, that the question of resolving an ambiguous contract is a question of fact, not law. The PSC is simply wrong on this point, as both it and the circuit court have already held.

The PSC is also wrong in arguing that the underlying case before the PSC was a "rate case." It was not. It was an ACA case. Riverside/MKP are not arguing that the PSC lacks jurisdiction over setting rates, but rather that after conducting an ACA prudence review, and settling that dispute for roughly $3 million and a promise to cease further prudence reviews, that it must honor the agreement it made.

The PSC goes on to argue that because it rejected the Staff's proposed prudence disallowance, it was unnecessary to resolve the question of its jurisdiction. That too is incorrect. As the circuit court found, the PSC's jurisdiction to initiate and conduct yet another prudence review of the decisions associated with the execution of the Missouri Agreements was a "threshold" issue that the PSC should have resolved. Riverside and MKP have the right to enforce their settlement agreement and invoke its preclusive effect of this and the other ACA cases filed by the PSC Staff without litigating the merits of each of these cases. To do otherwise would effectively nullify the Stipulation and deprive Riverside/MKP of the benefit of their bargain.

B. "When All Else Fails," An Ambiguity Must Be Construed Against the Drafter

Despite the fact that this case originated before the PSC, this case presents nothing more than a legal question of contract interpretation. Notwithstanding the PSC's focus in its brief on the proof submitted by the parties, the issue in this case is far more fundamental than a debate about who proved what. Indeed, the PSC itself stated in its Report and Order that the interpretation of the Stipulation was a question of law, not fact. This case is thus not about the PSC's faulty weighing of the evidence but instead its admitted failure to use the principles of contract construction to resolve the specific contract interpretation dispute submitted to it. More to the point, the issue here is whether a court or quasi-judicial body may refuse to resolve a contractual ambiguity or whether it is obligated to apply the rules of contract construction.

Missouri law is quite clear--when all else fails to resolve a contractual ambiguity, the ambiguity must be construed against the drafting party, *i.e.*, the "construed against the drafter" principle applies to break the proverbial "tie." When a question of law is submitted to a judicial or quasi-judicial body, "I don't know" is not a legitimate response. The entire purpose of rules of contract construction is to resolve ambiguities. Even if the PSC was correct when it found that the parties' proof failed to resolve the ambiguity, it was obligated to construe the agreement against the Staff's position as the drafter of the ambiguity.

Missouri law on this point has already been settled—in favor of the position argued by Riverside/MKP. In *Missouri Consolidated Health Care Plan v. BlueCross BlueShield of Missouri*, 985 S.W.2d 903 (Mo. App. 1999), the court held that an ambiguity must be construed against the drafting party if the parties' intent "cannot be determined otherwise from parole evidence." *Id.* at 910; s*ee also Specialty Restaurants Corp. v. Gaebler*, 956 S.W.2d 391, 395 (Mo. App. 1997) ("*when all else fails*, '[a]n agreement that is ambiguous should be construed against the drafter'") (emphasis added); *Wimberly By and Through Bauer v. Furlow*, 869 S.W.2d 314, 316 (Mo. App. 1994) ("*When other means of construction fail* courts apply the rule that an ambiguous contract is construed against the party who drew it.") (emphasis added); *Rouggly v. Whitman*, 592 S.W.2d 516, 523 (Mo. App. 1979) ("this rule is employed as a last resort *when other available data bearing on the agreement shed no light* on actual intent or meaning") (emphasis added).

According to the PSC, if an ambiguity is too difficult, it can throw up its hands and not resolve the ambiguity. For plainly obvious reasons, there are no cases among the dozens of reported decisions in Missouri addressing issues of contract interpretation where either a court or quasi-judicial body abdicated its duty to interpret a contract because there was only some evidence of intent, but not enough to resolve the ambiguity, which thereby prevented it from applying rules of construction.

The PSC's position also begs the question of why the PSC is appealing the judgment and order of the circuit court. Although Riverside/MKP are denominated as "appellants" pursuant to court rule, the PSC filed this appeal of the circuit court's judgment. Because the PSC was unable to resolve the ambiguity in the Stipulation, the PSC should be grateful to the circuit court for interpreting the stipulation. Instead, the PSC would now have the circuit court's judgment declared void so that the Stipulation itself can be rendered meaningless for all practical purposes and against Riverside/MKP. If the PSC believed this was the proper interpretation of the Stipulation, it certainly had the opportunity and should have so ruled in GR-96-450.

In re Marriage of Buchmiller, 566 S.W.2d 256 (Mo. App. 1978) holds that "where other rules of statutory construction fail, ambiguities appearing in a contract must be construed strongly against the party whose counsel prepared the contract or agreement." *Id*. at 260. Here, because the PSC acknowledges that counsel for the Staff drafted the agreement, and refused input from Riverside/MKP, it must be construed against the Staff and in favor of Riverside/MKP.

III. The Court of Appeals Erred in Declaring in Dicta that Circuit Courts in Missouri Lack Authority to Correct the PSC Because Circuit Courts Have the Authority to Correct the PSC In That § 386.510 Grants Circuit Courts Authority to Correct Any Order or Decision of the PSC

The scope of judicial review of agency decisions authorizes reviewing courts to exercise "unrestricted, independent judgment" and to "*correct* erroneous interpretations" of law. *Burlington N.R.R. v. Director of Revenue*, 785 S.W.2d 272, 273 (Mo. banc 1990); *see also All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994). According to the position adopted by the PSC to support the court of appeals opinion below, Missouri courts at any level are prohibited from doing anything other than "affirming" or "setting aside" an order of the PSC without further "interfering with" the PSC in the performance of its "official duties."

Contrary to the PSC's argument, Riverside/MKP agree that § 386.510 provides limiting language. As this Court has explained, the language limits courts from interfering with the original jurisdiction of the PSC within the framework established by the legislature. But § 386.510 does not preclude the circuit or appellate courts of this state from conducting their review according to the standards of review long acknowledged by the courts of this state. Under Article V, § 18 of the Missouri Constitution, decisions of administrative bodies like the PSC must be subject to the direct review of constitutional courts. *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982).

The notion that a circuit court, or appellate court, may only "reverse" a decision of the PSC without affirmatively declaring the law in correction of an erroneous statement of the law by the PSC is absurd. The standard of review adopted by this Court rejects that notion. It is further contrary to the purpose of administrative agencies. Executive agencies are created to handle particular regulated industries. But an agency's expertise in a particular industry does not operate to displace the expertise of constitutional courts in questions of law, or for that matter, determining whether decisions are supported by substantial and competent evidence.

Moreover, the PSC's argument advances form over substance. In many cases, like this one, it is merely a matter of semantics whether a reviewing court's "reversal" on a question of law constitutes a "correction" or a "setting aside" of a particular decision. Here, the PSC found that it could not interpret the Stipulation. The circuit court reviewed the Stipulation, interpreted it using the rules of contract construction, and declared the meaning as a matter of law. Both the PSC in its brief (p.14) and this Court in *Riverside III* characterize the circuit court's order as reversing the decision of the PSC. Whether the circuit court's actions actually constitutes a "correction" or a "reversal" of the PSC's Report and Order is a meaningless debate. To interpret § 386.510 otherwise would be constitutionally dubious and cause significant litigation over the actual effect of a decision of a reviewing court.

CONCLUSION

For the reasons set forth herein, Riverside/MKP request this Court to hold that it has jurisdiction to hear this case and issue an Opinion affirming the Judgment of the circuit court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH MO. R. CIV. P. 84.06(B) AND 84.06(G)

The undersigned certifies that the foregoing brief complies with the limitations contained in Mo. R Civ. P. 84.06(b) and, according to the word count function of MS Word 2002 by which it was prepared, contains 4,125 words, exclusive of the cover, Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the cd rom and diskette filed herewith containing this Substitute Reply Brief of Respondents in electronic form complies with Mo. R. Civ. P. 84.06(g), because it has been scanned for viruses and is virus-free.

_____

Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing, along with a diskette and cd rom containing a copy of the above and foregoing, was mailed postage prepaid, this 29th day of June, 2006, to:

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